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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-264

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, and its LOCAL NO. 171,
Petitioners,

vs.

SAM KANE PACKING COMPANY, SAM KANE WHOLESALE MEAT, INC., and SAM KANE MEAT, INC.,
Respondents.

REPLY BRIEF FOR PETITIONERS

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The Respondent's Brief in Opposition serves to emphasize the importance of the issues, and the necessity for their resolution by this Court if the national policy of settlement of labor disputes through contractual arbitration is to be effective.

1

Respondent's assertion (Oppn. p. 8) that "The company sought to obtain a judicial determination of arbitrability before agreeing to arbitrate . . ." unmasks its contrary assertion that it had appointed its arbitrator.

This assertion further demonstrates the fallacy in respondent's position. Actually, the agreement to arbitrate was made when the collective bargaining agreement was signed. Employer's

premise is that despite such agreement, there can be no arbitration of grievances which arise during the term of the agreement unless the parties **again** agree to arbitrate—or a court requires it. To require the parties to thus double back every time a grievance arises is the surest way to make arbitration inoperative. It was precisely to avoid this that the default procedure was adopted. It should be enforced.

2

Respondent asserts the "common practice . . . of seeking to have the Court compel the company to arbitrate" (Oppn. p. 6). This "common practice" is so devastatingly time consuming, and so emasculates the arbitral process, as to lead management and labor jointly by collective bargaining contracts to seek expedited procedures. The genius of our national labor policy is that:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. § 173(d)

This case presents a method agreed upon by the parties to expedite adjustment and to avoid the "common practice" which delays adjustment and clogs court dockets.

3

Cases from this Court,[1] and the Courts of Appeals,[2] which hold only that questions of arbitrability are for the courts, are cited by respondents for the proposition (never before presented here) that court determination of arbitrability must **precede** arbitration.

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[1] **Atkinson v. Sinclair Refining**, 370 U.S. 238 (1962); **John Wiley & Sons v. Livingston**, 376 U.S. 543 (1964).

[2] **Mogge v. District No. 8, IAM**, 387 F.2d 880 (C.A. 7, 1968).

Far from requiring prior court determination, this Court in **United Steelworkers v. Warrior & Gulf,** 363 U.S. 574 at 583, Note 7, stated that the parties could vest in the arbitrator the power to decide arbitrability.[3] A fortiori, the parties can contract for prompt arbitration, to precede court determination. For as Professor Cox observes:[4] ". . . surely no collective agreement contemplates elaborate proof of its industrial context first in the suit to compel arbitration and later in arbitration."

Nor may respondent take comfort from the cases it cites. In **Wiley**[5] this Court decided "whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all by the agreement's arbitration provision," 376 U.S. at 547. Determination that courts, rather than arbitrators are to determine arbitrability does not determine which comes first. Parties are left free to bargain and contract for the sequence. Certainly **Wiley** does

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[3] This Court's note stated, 363 U.S. at 583, Note 7, emphasis added:

> "It is clear that under both the agreement in this case and that involved in American Mfg. Co., 4 L. Ed. 2d 1403, the question of arbitrability is for the courts to decide. Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv. L.Rev. 1482, 1508-1509. Where the assertion by the claimant is that the parties **excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator,** the claimant must bear the burden of a clear demonstration of that purpose."

[4] Archibald Cox, Reflections Upon Labor Arbitration, 72 Harvard L.Rev. 1482, 1515 (1959).

Professor Cox further argues (Ibid. at 1518):

> "To require the union to go to trial on the facts twice would be both wasteful and expensive. The delay would impair the value of arbitration. These disadvantages outweigh the costs to the employer of the arbitration proceeding, the risk of an invalid award, and any pressure he may feel to comply with an award even though it goes beyond the arbitrator's power."

[5] 376 U.S. 543 (1964).

not preclude the parties from agreeing, as here, that arbitration shall be expedited, and proceed forthwith despite one party's default. Post-arbitration court review remains available.

Nor may respondent take comfort from **Mogge**[6]—which, like **Wiley**, merely held the question arbitral. The sequel to **Mogge** is ignored by Respondent. There, **three years later,** and when the employer was continuing its recalcitrance, the Seventh Circuit enforced the arbitrator's award, and observed, 454 F.2d 510 at 513 (C.A. 7, 1971):

> "The national labor policy of encouraging private arbitration of labor disputes, because of its potential for expeditious disposition of these matters without resort to the courts, has been thwarted in this protracted case."[7]

Wherefore, certiorari should be granted.

Respectfully submitted,

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[6] **Mogge v. Dist. No. 8, IAM,** 387 F.2d 880 (C.A. 7, 1968), at Respondent's Brief, pp. 5, 7.

[7] Nor is the Eighth Circuit's pre-trilogy, **Food Handlers v. Pluss Poultry,** 260 F.2d 835 (C.A. 8, 1958) (relied upon at Oppn. p. 7) supportive of respondent. The collective bargaining agreement there made no provision for default arbitration. Nevertheless the Court, in the course of an otherwise rather unclear statement of its rationale, held that under §4 of the United States Arbitration Act: "**mere assertion of non-arbitrability by one of the parties would not make it necessary for the other to petition for a Court order to proceed.** . . . Questions as to arbitrability of such disputes are **initially** for the arbitrators and if they reach a wrong conclusion in that regard it is subject to correction by a court," 260 F.2d 835 at 838, emphasis added.